

February 20, 2008

Mr. Robert P. Reeder
1302 Barksdale Road
Newark, DE 19711

**RE: Freedom of Information Act Complaint Against
Delaware State University**

Dear Mr. Reeder:

On January 11, 2008, the Delaware Department of Justice ("DDOJ") received your complaint alleging that the Delaware State University ("DSU") violated the Freedom of Information Act, 29 *Del. C.* Ch. 100 ("FOIA") in noticing and in conducting by teleconference the June 28, 2007 meeting of its Board of Trustees ("the Board"). By letter dated January 22, 2008, the DDOJ asked DSU to respond to your complaint in writing by February 1, 2008. On January 29, 2008 we granted DSU's request for an extension of time in which to respond, and we asked that we receive their response by Wednesday, February 6, 2008. We received DSU's response by facsimile on that date.

RELEVANT FACTS

According to DSU the June 28, 2007 meeting of the Board was noticed on or about June 15, 2007 by placing a notice on the bulletin board outside of the Board room; the notice stated that the meeting would be by teleconference. DSU's response states that "As with regular board meetings, the June 28th meeting took place in the Board room...[which was] accessible to the public [through] a speaker phone in the board room that provides the participants the ability to hear and be heard throughout the room."

Mr. Robert P. Reeder
February 20, 2008
Page 2

Article VIII, sec. 4 of the Board's by-laws permit members to participate by teleconference and to be counted towards a quorum if all participants can hear one another. On June 28, 2007, no Board member was physically present in the room, but the DSU President and other DSU administrators were there. There is no dispute that a quorum participated in the call. The Board approved the FY08 budget for DSU, and that budget took effect on July 1, 2007. DSU has been conducting its operations based on that budget since that date.

RELEVANT STATUTES

FOIA's "Declaration of Policy", 29 *Del. C.* §10001, provides that "citizens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made...." To that end FOIA requires that "[e]very meeting of all public bodies shall be open to the public except those closed" for executive session as authorized by statute. 29 *Del. C.* §10004(a). A meeting is defined as a "gathering of a quorum for the purpose of discussing or taking action on public business." 29 *Del. C.* §10002(b). 29 *Del. C.* §10004(e)(2) requires public bodies to give a 7 day public notice of regular meetings. Special meetings, which are defined as those "held less than 7 days after the scheduling decision is made," need to be noticed "as soon as reasonably possible, but ...no later than 24 hours before such meeting." 29 *Del. C.* §10004(e)(3). Notices must include the place where the meeting will be held. 29 *Del. C.* §10004(e)(2).

LEGAL ANALYSIS

The notice of the Board meeting of June 28 was made on or about June 15—more than 7 days before the scheduled meeting—and thus was timely. However, in stating only that the meeting would be by teleconference, the notice did not state the place where the meeting would be held, as required by 29 *Del. C.* §10004(e)(2). The notice could reasonably have been interpreted to mean that the public would be excluded. Had the notice indicated that the public would be accommodated in the Board room, the public would have been on notice to come to the Board room to attend the meeting.

As to whether the meeting by teleconference was an open meeting, there are no Delaware cases that address the issue. Other states with statutory language similar to Delaware's are divided in how they view teleconferences. *Compare Freedom Oil Co. v. Illinois Pollution Control Board*, Ill. App., 655 N.E.2d 1184 (1995) (“gathering” did not require physical presence), *with State v. Board of County Commissioners of Seward County*, Kan., 866 P.2d 1024 (1994) (“gathering” means physical assembly). It is clear that the purpose of the General Assembly in enacting FOIA was to open to the public any convening of a quorum of a public body to discuss or take action on public business. The Board by-laws permit the Board to convene by teleconference. Under those circumstances a teleconference is a meeting within the meaning of FOIA. The June 28, 2007 meeting was open to the public as required by FOIA, in that the public was permitted to attend at the Board room.

Mr. Robert P. Reeder
February 20, 2008
Page 4

CONCLUSION

For the foregoing reasons, the DDOJ determines that DSU did not meet the requirements of FOIA when it noticed the June 28, 20007 Board meeting, but did not violate FOIA's open meeting requirements. As you know, 29 *Del. C.* § 10005(a) bars the public from bringing any action in the Court of Chancery for violation of FOIA when more than six months have elapsed since the violation occurred. *Reeder v. Delaware Department of Insurance*, Del. Ch., 2002 WL 510067, aff'd 931 A.2d 1007. In fact, your complaint to this office was made more than six months after the triggering event. Because of the lapse of time, and DSU's reliance on the budget passed at the June 28, 2007 meeting, the Attorney General would undoubtedly be unable to obtain a court order invalidating the DSU FY08 budget. *Wilmington Federation of Teachers v. Howell*, Del., 374 A.2d 832, 836 (1977). For that reason, the Attorney General will not take any action to invalidate the June 28, 2007 meeting of the Board of Trustees of Delaware State University.

Very truly yours,

Judy Oken Hodas
Deputy Attorney General

APPROVED

Lawrence W. Lewis
State Solicitor

Mr. Robert P. Reeder
February 20, 2008
Page 5

cc: The Honorable Joseph R. Biden, III
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